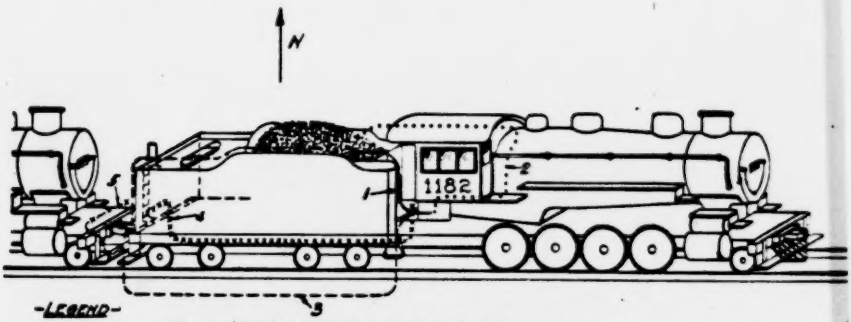
Appendix-A



-LEGEND-

1. Straight back from cab, up coal ladder to top of tender.
2. Through front door of cab, over top of cab, to top of tender.
3. Dismount from cab to ground on engineers side, walk to rear of tender and climb ladder on engineer's side to top of tender.
4. Dismount from cab to ground on firemen's side walk to rear of tender, climb over the draw bars to engineer's side and climb ladder to top of tender.
5. Same as No. 4 except across the pilot platform of No. 1149 instead of over the draw bars.

APPENDIX B

The decision by the Supreme Court of Utah that Bruner, as matter of law, was not guilty of contributory negligence disposed of exceptions taken in the trial court and errors relied on in the Supreme Court as follows: The trial court in Instruction No. 6 told the jury that Bruner had the right to assume that the engines would not be moved without signal; that Bruner had the right to presume that the rules and regulations of the Railroad would not be violated; and that Bruner had the right to act upon such presumption. (R. 10) The railroad excepted to Instruction No. 6 and to each part thereof. (R. 11)

Instruction No. 6 was clearly erroneous in telling the jury that Bruner could assume and presume and act upon such presumption that the engine would not be moved and that rules and regulations would be observed. To hold that Bruner might thus presume and act would absolve Bruner from the duty of exercising due care for his own protection. It violates the fundamental rule applied in every variety of negligence case that plaintiff as well as defendant must exercise due care and is not relieved from that duty merely because it has been disregarded by the other party.

Wilkinson v. *O. S. L. R. Co.*, 35 Utah 110, 99 Pac. 466

Pippy v. *O. S. L. R. Co.*, 79 Utah 439, 11 Pac. (2d) 305

Rockport Coal Co. v. *Barnard*, 210 Ky. 5, 273 S. W. 533

McPherson v. *Walling*, 53 Cal. App. 563, 209 Pac. 209

Roller v. *Daleys, Inc.*, 219 Cal. 542, 28 Pac. (2d) 345

Hutson v. *So. Cal. Ry. Co.*, 150 Cal. 701, 89 Pac. 1093

Merely because the trial court may have instructed the jury in some other instruction with respect to contributory negligence does not cure the error in this instruction under the decisions of the Supreme Court of Utah.

Sorenson v. *Bell*, 51 Utah 262, 170 Pac. 72
State v. *Waid*, 92 Utah 297, 67 Pac. (2d) 647
Konold v. *R. G. W. Ry. Co.*, 21 Utah 379, 60 Pac. 1021

On appeal to the Supreme Court of Utah the Railroad, in paragraphs 1, 2 and 3 of its Statement of Errors Relied On, (R. 133) contended that prejudicial error was committed in the giving of such instruction.

The Supreme Court of Utah avoided the error thus disclosed by holding that under the evidence as matter of law Bruner was not guilty of contributory negligence. (R. 106, 107)

In paragraph I of the Petition for Rehearing (R. 135) the Railroad contended that the Supreme Court of Utah erred in so holding.

In Instructions Nos. 9 and 20 (R. 11, 12) the court instructed the jury that if it found in favor of Bruner on the issue of liability "he would be *entitled to receive* as compensation for such loss and impairment of future earning power, the value or equivalent of said loss and impairment of future earning power if paid now in a lump sum," etc. This mandate to the jury was unconditional. The jury could not obey that mandate and also make any deduction for contributory negligence, however gross such contributory negligence may have been.

Even were it not well settled in Utah as elsewhere that an erroneous instruction on a material point cannot be cured by

another contradictory instruction, this charge of the trial court would constitute reversible error. This is true because a statement elsewhere in the instructions that a deduction should be made from the aggregate amount of damages suffered by plaintiff for any contributory negligence on his part, does not negative the unconditional direction that plaintiff must "receive" the full present value of one element of his damage, to wit, "loss and impairment of future earning power."

In *Sorenson et al.* v. *Bell*, 51 Utah 262, 170 Pac. 72, the trial court gave conflicting instructions relative to the burden of proof with respect to contributory negligence. In reversing the judgment of that court because of such error, the Utah Supreme Court says at pages 265-6 of the Utah report:

> True, counsel point to other portions of the charge wherein, they contend, the rule respecting the burden of proof is correctly stated. If that be conceded, it still does not minimize, much less cure, the palpable error contained in the foregoing instruction. At most it would merely present a case where two instructions were given upon the same subject, one proper and the other improper. Where such is the case, and the evidence is conflicting upon the subject covered by the instructions, or is such that more than one conclusion is permissible, and the record leaves it in doubt whether the jury followed the instruction that is proper or the one that is improper, then but one result is legally permissible in this court, and that is to reverse the judgment and grant a new trial to the aggrieved party. The district court no doubt had in mind correct principles of law when it framed the instruction, but in stating those principles it used language which cast a burden on plaintiffs which the law does not require of them. The instruction is therefore clearly erroneous.

In *State* v. *Waid*, 92 Utah 297, 67 Pac. (2d) 647, the Su-

preme Court of Utah quotes its language in *Sorenson* v. *Bell*, at page 307 of the Utah report and then continues on page 307 as follows:

> "Instructions on a material point in the case which are inconsistent or contradictory should not be given. The giving of such instructions is error, and a sufficient ground of reversal, because it is impossible, after verdict, to ascertain which instruction the jury followed, or what influence the erroneous instruction had in their deliberation. This has been so uniformly held that citations are unnecessary."

Accord: *Konold* v. *R. G. W. Ry. Co.*, 21 Utah 379, 60 Pac. 1021.

The Railroad excepted to Instructions 9 and 20 and each part thereof. (R. 12, 13) On appeal to the Supreme Court of Utah the Railroad in paragraphs 4, 5, 6 and 7 of its Statement of Errors Relied On contended that prejudicial error was committed in giving Instructions 9 and 20. (R. 133, 134) The Supreme Court of Utah avoided the error thus disclosed by holding that under the evidence as matter of law Bruner was not guilty of contributory negligence. (R. 106, 107) In paragraph 1 of the Petition for Rehearing the Railroad contended that the Supreme Court of Utah erred in so holding. (R. 135)

APPENDIX C

The decision by the Supreme Court of Utah that the Railroad was guilty of negligence as matter of law disposed of exceptions taken in the trial court and errors relied on in the Supreme Court as follows:

In Instruction No. 6 (R. 10) the court told the jury that Bruner had the right to presume *and act upon the presumption* that Colosimo (Bruner's boss) would obey and not violate any

of the rules and regulations of the Railroad Company pertaining to the movement of its trains and engines and the safety of its employees in force at the time. The two rules pleaded and before the court were Rule 2057 as follows:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute. (R. 5)

and Rule 30 as follows:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade. (R. 4)

The Railroad excepted to such portion of Instruction No. 6 (R. 11). Instruction No. 6 was erroneous for two reasons: *first*, the two rules were not applicable to yard movements; *second*, it told the jury that a disregard of those rules constituted negligence per se whereas the existence of the rules should at most only have been submitted to the jury as one circumstance for its consideration.

On appeal to the Supreme Court of Utah the Railroad, in paragraphs 1, 2 and 3 of its Statements of Errors Relied On (R. 133), contended that prejudicial error was committed in the giving of that instruction.

The Supreme Court of Utah avoided the error thus disclosed by holding that the evidence of negligence on the part of the Railroad was such that the Court could have directed a verdict in favor of Bruner and it was not prejudicial error for the Court to give the instruction on these rules even though the rules were inapplicable. (R. 110)

In paragraph II of the Petition for Rehearing (R. 135) the Railroad contended that the Supreme Court of Utah erred in so holding.

APPENDIX D

Instruction No. 6 (R. 10) *erroneously assumes as matter of law that Bruner at the time of accident was within the protection of the rules as to signals before moving engines.*

That assumption disregards the evidence that Bruner could have reached the top of the tender of 1182 by using facilities designed for the purpose, entirely suitable and safe, but chose one that was entirely unsuitable, unsafe and not designed for the purpose of being climbed over. Safety rules promulgated by the master are applicable only to those within the class of persons for whose protection the rule was adopted.

Thus in *Hartung* v. *Union Pacific R. Co.*, 35 Wyo. 188, 247 Pac. 1071, a suit for death under the Federal Employers' Liability Act, decedent was sent to back flag and was struck and killed by the train which he was supposed to stop. Plaintiff claimed defendant was negligent in that the rear lights of his train were green instead of red as required by the rule. It was held that decedent was not within the class of persons for whose protection the rule was adopted.

In *Sears* v. *Texas & N. O. Ry. Co.*, 247 S. W. 602, a brakeman sent to back flag went to sleep by or on the track and was killed by the train which he should have stopped. Plaintiff claimed the protection of a rule requiring that train to stop when a red lantern is placed on or near the track. On page 608 the court said:

> * * * However, if it be conceded that the red lantern was placed by Sears in the proper place to give warning of danger to the engineer, it must be further conceded that it was so placed to warn those in charge of an approaching train of danger to said train and its passengers and of the danger to trains ahead. It certainly was not intended to be, nor was it in fact, even

> a remote warning that the brakeman who set the warning was or could probably be asleep on the track or so near thereto as to be struck by the engine; no such danger could have been reasonably anticipated by the engineer had he seen the warning signal. As already stated, an injury is not actionable if it could not have been foreseen or reasonably anticipated.

In the same case, before the Commission of Appeals, 266 S. W. 400, that court on page 407 said:

> Like the omission of any other precaution required at common law, or even by statute (as in the case of crossing signals, Norfolk, etc. Co. v. Gesswine, 144 F. 59, 75 C. C. A. 214) the disobedience of a rule is only negligence towards those who have a right for the protection of which a duty arises. And, as has been seen, the deceased in this case was not in the latter position. In addition, a failure of compliance with the rule was not as to him the proximate cause of his death, because a person in his situation could not have been "reasonably anticipated."

Accord: *Ellis' Adm'r* v. *Louisville, H. & St. L. Ry. Co.*, 155 Ky. 745, 160 S. W. 512.

The Supreme Court of Utah has recognized the same principle in *Humphreys* v. *Davis*, 61 Utah 592, 217 Pac. 693. There a cinder pit employe took a position on skeleton tracks over the pit. On page 694 the court said:

> The track in question was not designed to stand or walk upon. No person could reasonably be expected to be upon it.

So in this case. The rear end of the tender of 1182 is not designed for passage of employees from one side to the other. Exhibit 3 (R. 62A, introduced in evidence at R. 62) demonstrates this. The difference in height between the steps and

the top of the draw bar and coupler makes passage awkward and difficult. The handhold is too low with reference to the top of the draw bar for such undesigned use. If Bruner had laid down on the track and been run over by the movement of engines he would as matter of law not have been within the class of persons for whose protection the rules in regard to signals were adopted. But his conduct, it is submitted, was outrageously negligent. He had many designed, suitable and safe ways of reaching the required point. He ignored them and chose a highly dangerous, unsuitable and undesigned way. It is as if an employe whose duty required him to go to the floor below disregarded the staircase and tried to slide down the elevator shaft or a drain pipe.

But we need not go so far as to contend that Bruner's actions placed him outside the protection of the rules as matter of law. We need only point out that it was at least a question for the jury as to whether Bruner's conduct was such as to bring him within or leave him without the protection of the rules.